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Nos. 84-1500 and 84-1519

In The

Supreme Court of the United States

October Term, 1984

CONTICOMMODITY SERVICES, INC.
and
COMMODITY FUTURES TRADING COMMISSION,

Petitioners,

v.

WILLIAM T. SCHOR and MORTGAGE SERVICES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONS FOR CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the terms of § 14 of the Commodity Exchange Act, as worded prior to the amendments of 1983, conferred on the Commodity Futures Trading Commission jurisdiction to award money damages to a broker on a counterclaim of the broker based solely on a state common law cause of action in a case where it has ruled that there was no violation of the Commodity Exchange Act as claimed in the customers' reparations claims in chief and has rejected common law claims and common law defenses to the counterclaim asserted by the customer-claimants in chief.

STATEMENT UNDER RULE 28.1

Respondent, Mortgage Services of America, a New Jersey Corporation, is a wholly-owned subsidiary of The Howard Savings Bank, a New Jersey Stock Savings Bank Corporation. Affiliates of Mortgage Services of America are the other wholly-owned subsidiaries of The Howard Savings Bank which are: The Howard Federal Savings F.A., HOWCO Investment Group, The Howard Relocation Group, The Howard Insurance Group and HOWCO Residential Development, Inc.

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ADDITIONAL RELEVANT AUTHORITY

The decision of the court of appeals agrees exactly with the original CFTC construction of the Commodity Exchange Act Reparations provisions regarding counterclaims. The Commission's originally proposed rules limited counterclaims (like claims) to those predicated on violations of the Commodity Exchange Act, as did the decision of the court below. The CFTC Commentary on those proposed rules stated:

> But there appears to be a substantial question whether the Commission has been authorized by § 14(a) to permit any "reparation award" to be based upon matters other than alleged violations by a registrant, and whether jurisdiction has been granted, under that section or otherwise, to enter any money-damage award on any other basis. 40 Fed. Reg. 55,666, 55,667 (1975).

In reaction to futures industry objections the Commission's final rules expanded the scope of the counterclaim provision of Reparation Rule 12.23(b) (2) to include those based on state law. 41 FED. REG. 3,993, 3,995 (1976).

It should be noted that the "substantial question" concerning jurisdiction over counterclaims related solely to the language of the Commodity Exchange Act and not to any conflict with Article III of the Constitution.

COUNTERSTATEMENT OF THE CASE

The court below invalidated a CFTC regulation (17 C.F.R. § 12.23(b) (2) (1983), now codified at § 12.19) permitting counterclaims based on state common law causes of action in CFTC reparations proceedings. In reparations

proceedings initial claims must be based on violations of the Commodity Exchange Act ("the Act"). 7 U.S.C. § 18. The court below found the Act, as worded prior to the 1983 amendments, did not authorize the CFTC to entertain state law counterclaims.

One of the reasons advanced by the Court in holding that the Act did not authorize such counterclaims was that the Act should not be construed so as to raise a Constitutional issue if such a construction can be avoided. It then found that the Act and its legislative history supported a construction excluding non-Act counterclaims.

The Court of Appeals, on its own motion, raised the issue of whether CFTC adjudication of common law counterclaims also violated Article III of the United States Constitution. It concluded that it was not necessary to reach that Constitutional question because the Commodity Exchange Act did not indicate a Congressional intent to confer jurisdiction over common law counterclaims upon the CFTC. It based that decision on the following points:

1. The Commodity Exchange Act can be fairly construed so as to be free of even arguable Article III Constitutional objections.

2. While the Act and its legislative history mention counterclaims (without expressly authorizing them), nowhere is there mention of state law or even non-Act counterclaims.

3. The Act and its legislative history do not demonstrate a Congressional intention regarding CFTC

jurisdiction over common law counterclaims and none should be read into the Act.

4. The Act can be read to authorize only those counterclaims based upon violations of the Act to which there are no Constitutional objections.

5. The deference to the statutory construction by an agency of a law it administers does not apply where the agency's construction has been inconsistent and where the question is one of jurisdiction and legislative delegation of power with which courts customarily deal.

6. Amendments to the Act and their legislative history subsequent to this case and Congressional silence on this issue do not ratify the present Conti and CFTC interpretations, particularly where there is no explicit statement in any of those materials that the CFTC was expected to exercise jurisdiction specifically over state common law counterclaims.

7. Congress has never before authorized any administrative agency to decide common law counterclaims and, without a clear expression of an intent to confer such unprecedented power, it should not be inferred.

8. Neither Congress nor the CFTC considered the Article III Constitutional questions raised by CFTC adjudication of state law counterclaims and, therefore, a Congressional intent to provoke those questions should not be inferred.

The Court of Appeals denied suggestions for rehearing and rehearing en banc by a vote of nine to two. The

dissent from the denial of a rehearing stated that the court "should squarely face the issue of whether such a statutorily crafted scheme is unconstitutional". Conti Appendix, C-3; CFTC Appendix 63a.

Respondents in this Court, William T. Schor (Schor) and Mortgage Services of America (MSA), filed reparations claims against ContiCommodity Services, Inc. (Conti), a Petitioner here, and Richard Sandor. These claims were filed with the Commodity Futures Trading Commission (CFTC), the other Petitioner here. Pursuant to § 14 of the Commodity Exchange Act, 7 U.S.C. § 18, the CFTC established a reparations procedure under which any person injured by a violation of the Act or CFTC regulations thereunder may petition the CFTC for an order directing payment of reparations by the violator to that injured person.

Conti's response to the Schor and MSA reparations claims included counterclaims against each asserting they were liable to Conti under state common law principles for deficits in their futures trading accounts with Conti.

After an evidentiary hearing before a CFTC Administrative Law Judge and briefing by both sides, the ALJ directed Conti's counsel to prepare a Proposed Initial Decision dismissing the claims of MSA and Schor and granting the Counterclaims of Conti against them. MSA and Schor objected to the Proposed Initial Decision arguing, inter alia, that the CFTC was not authorized by Congress to adjudicate counterclaims not based on violations of the Act and that the ALJ had refused to consider common law claims of Schor and MSA based on the same

transactions even as defenses to Conti's common law counterclaims.

The Proposed Initial Decision prepared by Conti's counsel was adopted, essentially verbatim, by the ALJ. With regard to the objection to the awards on the counterclaims the ALJ did add:

> This may be a neat legal point. However, an administrative law judge is bound by agency regulations and published agency policies. The rules provide for counterclaims". Conti Supplemental Appendix, F-9: CFTC Appendix, 54a-55a.

Application for review of the Initial Decision by Schor and MSA was denied by the Commission and they appealed to the United States Court of Appeals for the District of Columbia Circuit pursuant to § 14(g) of the Commodity Exchange Act. 7 U.S.C. (& Supp. V. 1981) § 18(g).

In this Court Conti and the CFTC have filed separate petitions for certiorari, both restricted to the issue of whether the CFTC is authorized to hear state law counterclaims. Respondents have cross-petitioned only on whether the CFTC can hear customers' state law defenses and counterclaims to brokers' counterclaims.

REASONS FOR DENYING CERTIORARI

I. Granting Certiorari Will Only Confuse, Not Clarify, The Law Under Article III Of The Constitution.

Petitioners would have this Court go out of its way to reopen a Constitutional Pandora's box. This the Court of Appeals declined to do.

Obviously, if this Court were to decide that Congress had intended the CFTC to have jurisdiction over common law counterclaims it would then have to decide whether this violates Article III of the Constitution since no CFTC official has the tenure and salary protections provided by Article III.

On the other hand, by construing the Commodity Exchange Act, as worded prior to 1983, as not expressing a Congressional intent to authorize the CFTC to adjudicate common law counterclaims, the Court of Appeals avoided a constitutional confrontation with Congress and the confusion it would generate on the very sound basis that there was no indication that Congress intended such a confrontation. If Congress decides now that it wishes the CFTC to have such authority it can amend the Commodity Exchange Act to so provide.

Clearly, the Court below was correct in avoiding this issue. And the granting of certiorari here would confront the Court with a case where any decision would only confuse, not clarify, the law under Article III.

If this Court were to reach the Article III constitutional issue concerning counterclaims and decide it either way it would seem to be approving the express Congressional grant of jurisdiction to the CFTC to adjudicate private disputes between individuals based on violations of the Commodity Exchange Act. This is an issue that should be addressed directly but it is not presented by either these Petitions, or by Respondents' Cross-Petition. Such an appearance of Constitutional approval would encourag Congressional creation of non-Article III forums to

decide private disputes, even if the Court held that state law counterclaims cannot be tried by non-Article III forums.

This case also illustrates how expansive jurisdiction must be made once state law counterclaims are included. Here the claimants also asserted state law claims both as claims and defenses to the state law counterclaims of Conti. The ALJ rejected that position but as the Court of Appeals noted, the CFTC in that Court was expressly noncommittal on whether a claimant may introduce state law claims and defenses against state law counterclaims. 740 F.2d at 1279, fn. 29. See Respondents' Cross-Petition in this case raising that issue.

In summary, the case does not present this Court with an opportunity to clarify the law under Article III.

II. The Decision Below Does Not Conflict With Those Of This Or Any Other Court.

Neither Petitioner contends the decision creates a conflict among the circuits. Conti alone argues that this case conflicts in principle with a later Tenth Circuit case. *United States v. Dobey,* 751 F.2d 1140 (10th Cir. 1985). No such conflict exists. The only similarity between the cases is that both mention Article III. *Dobey* found the Magistrates' Act Constitutional. This case did not reach the Article III question under the Commodity Exchange Act. In construing § 14 of the Act as worded prior to the 1983 amendments it found Congress did not intend that the CFTC adjudicate state law counterclaims. It found that conclusion fortified by the Article III constitutional questions the opposite construction would raise.

Even if this case had invalidated the CFTC counterclaim regulation on an Article III theory, it would not conflict with any Article III case.

Dobey and all the other Magistrates Act cases, necessarily involved express, uncoerced consent to trial by an official designated and supervised by an Article III court. Those cases were also each subject to removal of the case by such a court. Certainly no such consent is involved here. The CFTC is not appointed or supervised by any Article III court. Reparations proceedings are not removable to any Article III court. And, finally, no Article III question was decided here.

Thus, the case conflicts with none of the Circuit decisions cited by Petitioners.

In fact, even if it was based on an Article III rationale, it would be in perfect harmony with those cases and with the only case which expressly dealt with a counterclaim under Article III. That case is *1616 Reminc Limited Partnership v. Atchison & Keller,* 704 F.2d 1313 (4th Circuit 1983). There a bankrupt filed a state law counterclaim to a proof of claim and both the claim and counterclaim were tried before a referee in bankruptcy under the Bankruptcy Act of 1898, as amended, and both were dismissed by the referee. The counterclaiming bankrupt contested, under Article III, the validity of the referee's decision against its own counterclaim. The Fourth Circuit held the trial of the state law counterclaim by the referee was invalid under Article III. It specifically found that seeking protection of the bankruptcy act did not imply consent to trial by an otherwise unconstitutional tribunal. 704 F.2d at 1318, fn. 14. Likewise here, the court of ap-

peals would not imply consent from the filing of the CFTC reparations proceeding.

The assertions by Petitioners that the case conflicts with decisions of this Court are also wrong. This Court has never construed § 14 of the Commodity Exchange Act regarding any issue concerning either Article III or state law counterclaims.

Of course, *McElrath v. United States,* 102 U.S. 426 (1880), cited only by the CFTC, addressed no Article III question. It merely illustrated that a waiver of sovereign immunity could be made subject to any conditions imposed by the sovereign. *McElrath* does not support Congressional creation of non-Article III tribunals authorized to decide private counterclaims under state law.

Crowell v. Benson, 285 U.S. 22 (1932), also mentioned only by the CFTC, involved adjudication only of rights created by Congress, not state common law rights.

Of the other Supreme Court cases cited by Petitioners, all but two involved adjudication by officials appointed and supervised by an Article III court, and involved cases subject to the jurisdiction of and to removal to an Article III court. *Kimberly v. Arms,* 129 U.S. 512 (1889); *Heckers v. Fowler,* 69 U.S. (2 Wall.) 123 (1865); *Katchen v. Landy,* 382 U.S. 323 (1966); *Cline v. Kaplan,* 323 U.S. 97 (1944); and *McDonald v. Plymouth County Trust Co.,* 286 U.S. 263 (1932).

One of the remaining cases cited, *Scherk v. Albert Culver Co.,* 417 U.S. 506 (1974), an arbitration case, did not involve a forum created or appointed by either Congress or the Executive Branch.

The other case, *Northern Pipeline Construction Co. v. Marathon Pipeline Co.,* 458 U.S. 50 (1982), held that

the Bankruptcy Act of 1978 violated Article III to the extent that it conferred jurisdiction on Bankruptcy judges to hear state law claims over the objection of one of the parties. Of course, there was no issue of consent in that case. In this case, the Article III question was not reached and the lower court indicated it could not imply consent on the record here since Schor and MSA "forcefully argued, both before and after the ALJ's *Initial Decision,* that the Commission lacks statutory authority to award Conti breach of contract damages." 740 F.2d at 1276. Additionally the court here, as did the Fourth Circuit in *Reminc,* supra, indicated that acquiescence to non-Article III adjudication of state law claims should not be a price paid by operation of law for access to a federal benefit.

Of course, the court below expressly noted it was not deciding the issue of whether consent overcomes Article III objections. 740 F.2d at 1276.

Thus, even if the court of appeals had decided that CFTC adjudication of state law counterclaims violates Article III, there would have been no conflict with any decision of this Court or any other court of appeals. Of course, there was no Article III decision made here.

III. The Decision Resolves No Important Question Of Federal Law.

Petitioners also contend that the case involves an important issue of Federal law because of its impact on the CFTC reparations procedure. Actually, the case involves a narrow statutory construction and procedural issue affecting the scope of counterclaims in a unique procedure involving a relatively small category of cases.

Both petitioners have attempted to magnify the significance of the decision by claiming that unless the CFTC has jurisdiction over common law counterclaims no one will use the CFTC reparations procedure.

The CFTC has volunteered no statistics on the numbers of cases that involve counterclaims. However, the order it entered decreeing that it will continue to process counterclaims despite this case specified only sixty cases involving counterclaims docketed from 1980 through the date of the order, September 10, 1984. See *In the Matter of Various Reparations Proceedings in Which Counterclaims have Been or in the Future are Filed,* 2 Comm. Fut. L. Rep. (CCH) ¶ 22,352. While the CFTC has furnished statistics that 8000 reparations claims have been filed since 1976, or approximately 1000 per year, it has not indicated what percentage of the cases involved counterclaims. But since there are only sixty counterclaim cases presently pending, apparently filed over a period of at least four years, that would seem to indicate that counterclaim cases represent something less than two percent of the cases filed.

Moreover, the withdrawal of counterclaim jurisdiction does not really change the situation confronting customers trying to decide whether to proceed in reparations, court or arbitration. See 17 CFR § 180.1 et seq. Even before this decision, brokers could and did file their state law claims in court instead of counterclaiming. In fact, that happened in this case.

Of course, the CFTC can itself obviate any difficulty its lack of jurisdiction over state law counterclaims allegedly presents. By exercising its authority to regulate

registrants under the Act it can direct them not to pursue court proceedings for a deficit balance to judgment until pending reparations proceedings are concluded. It can also direct registrants to give credit for any reparations awarded against them.

Whether or not the CFTC takes this sensible step for the benefit of customers it is supposed to protect, customers will file there regardless of where their brokers file against them. That is exactly what Schor and MSA did here.

Thus, the impact of this decision does not reach much beyond the parties to the case. And if Congress believes the decision significantly diminishes the efficacy of the reparations program, it can legislatively rectify the situation by, among other options, expressly authorizing state law counterclaims. Then, if there is an Article III constitutional issue raised, it would be ripe for decision.

IV. The Decision Correctly Construes An Act Of Congress And Resolves No Article III Constitutional Question.

While the CFTC argues here that denial of jurisdiction over state common law counterclaims against customers will deter customers from using the CFTC as a reparations forum, this somewhat strained argument was not a reason given by the CFTC when it reversed its original position that only counterclaims based on act violations were authorized by the act. Instead, in promulgating the regulation authorizing such counterclaims, it relied on numerous comments that the proposed regulation was "unfair, prejudicial to respondents", who are, of course, always brokers.

However, a reading of the Commodity Exchange Act and its legislative history reveals total and almost studious avoidance by the legislature of language referring to state law counterclaims, common law counterclaims, and counterclaims not based on violations of the Act. From this it is more than reasonable to infer that Congress believed such jurisdiction would be Constitutionally suspect and intended to avoid the issue. Under these circumstances this Court should do likewise. This is especially so when the CFTC itself expressly doubted its authority to provide for counterclaims not based upon violations of the Act in its proposed reparations and its commentary thereon. 40 Fed. Reg. 55,666, 55,667 (1975). As pointed out above (see supra, page 1), based on industry comments, the final regulations implementing the reparations procedure provided for counterclaims such as those invalidated here. 41 Fed. Reg. 3994, 4002 (1976); 17 C.F.R. § 12.23(b) (2) (1983) now codified at 17 C.F.R. § 12.19.

Even in *Friedman v. Dean Witter and Company, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307 (CFTC 1981), where the CFTC ruled that its current counterclaim regulation was valid, it stated:

> "Clearly, reparations was designed primarily as a forum in which customers might vindicate grievances against commodity professionals where violations of the Act and regulations are involved, *and not for debit balance collection at the behest of commodity professionals.*" [1981-82 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307 at p. 25,538. (Emphasis supplied).

Applying the standards used by this Court in determining Congressional intent when the law is itself silent (which is not the case here), the conclusion is inescapable

that Congress did not intend the CFTC to entertain non-Act counterclaims. For example, in the area of determining whether Congress intended a private right of action to exist for violation of a federal regulatory scheme each test points toward a denial of CFTC authority to entertain non-Act counterclaims.

One test, whether the claimant is part of the class for whose especial benefit the statute was enacted, when applied to these counterclaims demonstrates that authority to make non-Act counterclaim awards cannot be inferred since the reparations procedure was not intended for their benefit. See *Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33 (1916). As the CFTC itself recognized in *Friedman,* supra, Congress never intended to benefit the class whose depradations it sought to deter.

Another indication of Congressional intent used by this Court in the private right of action area is whether it is consistent with the underlying purposes of the legislative scheme to imply a remedy for the claimant. E.g. *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers,* 414 U.S. 453 (1974) and *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412 (1975).

The purpose of CFTC reparations is to afford a remedy for customers against registrants, not vice-versa.

Since *Cort v. Ash,* 422 U.S. 66 (1975) the Court has emphasized determination of actual Congressional intent over the *Rigsby* implied intent approach. Neither the statute itself nor its legislative history indicates any intent to permit non-Act counterclaims in CFTC reparations proceedings. In fact all indications are to the contrary, as the CFTC found in its original proposed reparations regulations.

Of course, before resort may be made to legislative history or court created indicators of legislative intent, the statute itself must be found to be ambiguous. Section 14 of the Act limited reparations awards, at the time this claim arose and today, to violations of the Act, not once but three times. In Section 14(a) it limits applications to the CFTC for reparations to those "complaining of any violations of any provision the Act or any rule, regulation or order thereunder by any person who is registered or required to be registered under [the Act]." 7 U.S. C. § 18.

In Section 14(c) of the Act as worded at the time this claim arose it required the Commission to "determine whether or not the respondent has violated any provision of this Act or any rule, regulation or order thereunder."

Finally Section 14(e) (as it existed when this claim arose and at the time of the hearing thereon) authorizes the Commission to "determine the amount of damage, if any to which such person is entitled as a result of such violation" if "the Commission determines that the respondent has violated any provision of this Act, or any rule, regulation or order thereunder."

All parties concede that failure to pay a deficit balance in a trading account is not a violation of the Act. Therefore, in the absence of a finding of a violation of the Act the CFTC had no jurisdiction to make an award of any kind.

Finally, during the Congressional Hearings on the then proposed Commodity Futures Trading Commission Act of 1974, which created the CFTC reparations procedure, numerous witnesses, all representing registrant interests—none representing customers, testified that the

statute should "delineate the scope of permitted counterclaims" and "that counterclaims should be permitted." See Commodity Futures Trading Commission Act of 1974: Hearings on H.R. 11955 before the House Comm. on Agriculture, 93rd Cong., 2d Sess. 97, 169, 254 (1974). In spite of this apparently unanimous plea by the industry Congress decided in 1974 not to state in the Act or elsewhere that non-Act counterclaims were to be entertained by the CFTC. When Congress does not include a requested provision then the only possible conclusion is that Congress denied the request.

CONCLUSION

Certiorari should be denied because the petitions present no issue that will resolve any Constitutional question, any conflict among the circuits or any significant question of federal law. Moreover, the decision below is correct.

Respectfully submitted,

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